

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOHN KNIGHT, et. al.)
)
Plaintiffs)
)
v.) 04-12698 JLT
)
CHRISTMAS TREE SHOPS, INC.)
)
Defendant)

OPPOSITION TO THE MOTION TO STRIKE THE SURVEY AND REPORT
OF PLAINTIFFS' JOHN KNIGHT AND DONNA RUSSELL KNIGHT

Plaintiffs vigorously oppose defendant's motion to strike the survey and report of The Glass Eye. The Court of Appeals for the First Circuit stated that concerning the issue of secondary meaning, surveys are the preferred form of proof. *Boston Beer Co. Letd. P'ship v. Slesa Bros. Brewing Co.*, 9 F.3d 175 at 182. See also *The Yankee Candle Co. v. The Bridgewater Candle Co.*, 259 F.3d 25, 38 (1st Cir. 2001).

The Glass Eye could not afford to hire an outside expert to conduct a survey. Pursuant to the spirit and the letter of the Federal Rules of Civil Procedure, plaintiffs should be allowed to present a report of their own survey. Rule One of the Federal Rules of Civil Procedure provides that the rules "shall be construed and administered to secure the just, speedy, and *inexpensive* determination of every action." (emphasis added). The court should not require all plaintiffs in trade dress cases to hire expensive experts, who probably could not have conducted a more reliable survey than the one actually conducted by plaintiffs.

The court has the survey questions before it and can readily determine that they are all relevant, non-leading and straight-forward questions. Plaintiffs provided defendant with all

responses to the surveys and have had a full opportunity to question the methods used to conduct the survey.

In addition, lay experts are permitted to give opinion testimony pursuant to Rule 701 of the Rules of Evidence. The Report of the Survey is a well-conducted, logical survey that non-experts can conduct concerning consumer confusion. This is not rocket science.

It seems that all of defendant's objections are matters of weight of the evidence rather than admissibility. Defendant can simply call its own witnesses to criticize how the survey was conducted.

For all of these reasons, the motion to strike should be denied.

Respectfully submitted,

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